INVESTMENT ADVISER
ASSOCIATION

October 5, 2012

*VIA ELECTRONIC MAIL*

Ms. Elizabeth M. Murphy, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

**Re: Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings; SEC Rel. 33-9354; File No. S7-07-12**

Dear Ms. Murphy:

The Investment Adviser Association[1] appreciates the opportunity to submit comments on the rule amendments proposed by the Securities and Exchange Commission ("Commission") to implement Title II of the Jumpstart Our Business Startups Act ("JOBS Act").[2] The JOBS Act directed the Commission to amend its rules to eliminate the prohibition on general solicitation or general advertising for offerings under Rule 506 of the Securities Act of 1933, as amended ("1933 Act"), provided that all purchasers are accredited investors and that the issuer takes "reasonable steps to verify" their accredited investor status. The JOBS Act also required the Commission to amend Rule 144A to eliminate the prohibition on general solicitation or general advertising, provided that the securities are sold only to persons that the seller (or a person acting on the seller's behalf) "reasonably believes" is a qualified institutional buyer ("QIB"). Many of our members advise or sponsor private funds that rely on exemptions in Sections 3(c)(1) or 3(c)(7) under the Investment Company Act of 1940, as amended ("Investment Company Act"), where fund interests are offered and sold in a private placement under Rule 506.

We commend the Commission for its well-balanced approach to implementing the capital formation goals of the JOBS Act, and we support the Commission's proposed rules to remove the general solicitation and general advertising ban for private placements sold to accredited investors under Rule 506 and for purchases of securities under Rule 144A.

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[1] The Investment Adviser Association is a not-for-profit association that represents the interests of SEC-registered investment adviser firms. Founded in 1937, the IAA's membership consists of more than 530 advisers that collectively manage in excess of $10 trillion for a wide variety of individual and institutional investors, including pension plans, trusts, investment companies, private funds, endowments, foundations, and corporations. For more information, please visit our web site: www.investmentadviser.org.

[2] *See Eliminating the Prohibition on General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings,* SEC Rel. No. 33-9354 (Aug. 29, 2012) ("Proposal"), available at: http://www.sec.gov/rules/proposed/2012/33-9354.pdf. The text of the JOBS Act is available at: http://www.gpo.gov/fdsys/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

In adopting the final rules, we request that the Commission clarify and confirm certain issues, as discussed below.

Proposed Rule 506(c) to Require Reasonable Steps to Verify Purchasers are Accredited Investors

We support the Commission's proposal to amend Rule 506 to add new subsection (c) to permit issuers to use general solicitation or general advertising to offer and sell securities, so long as the following conditions are met: (i) the issuer takes "reasonable steps" to verify that all purchasers are accredited investors;[3] (ii) all purchasers are accredited investors as defined in Rule 501(a); and (iii) the issuer satisfies the conditions in Rule 501, Rule 502(a), and Rule 502(d) under Regulation D. In the Proposal, the Commission stated that whether the steps taken by an issuer are "reasonable" would be an objective determination based on the particular facts and circumstances of each transaction.

We support the Commission's approach to the requirement to take "reasonable steps" to verify purchasers are accredited investors. We agree with the Commission's determination not to require specific verification methods and its statement that whether the steps taken are "reasonable" should be an objective determination based on the particular facts and circumstances of each transaction. We are pleased that the Commission issued flexible guidance as to what may constitute "reasonable steps" to verify accredited investor status. This framework, as noted by the Commission, will give issuers and market participants the flexibility to adopt different approaches to verification based on the circumstances, such as the different types of accredited investors (*e.g.*, natural persons, public and private for profit and not-for-profit corporations, general and limited partnerships, business and other types of trusts, and funds and other types of collective investment vehicles), different types of issuers and offerings, changing market practices, and innovative means of complying with the verification requirement.

The Proposal identifies several examples of factors for consideration for issuers to determine if the steps taken to verify that all purchasers are accredited investors are reasonable. While we appreciate the Commission's identifying and elaborating on factors to consider when determining whether verification steps are reasonable, we request that the Commission confirm that issuers may satisfy the requirement to take reasonable steps to verify a purchaser's accredited investor status based on factors other than those cited in the Proposal, considering the facts and circumstances of the transaction.

We applaud the Commission for recognizing that many of the practices currently used by issuers in Rule 506 offerings would satisfy the verification requirement for Rule 506(c)

[3] In particular, the proposed rule states that the issuer "shall take reasonable steps to verify that purchasers of securities sold in any offering under this § 230.506(c) are accredited investors."

offerings.[4] For example, many issuers rely on placement agent representations, with appropriate protocols to satisfy issuers of the placement agent's due diligence, to verify an investor's accredited investor status. Another common method currently used by issuers is requiring the potential investor to certify and represent that the investor does in fact meet the definition of "accredited investor" in Rule 501(a). This method is well-established in private fund offerings, for example. We recommend that the Commission specifically recognize that issuers may rely on a representation by the purchaser for the verification requirement that the purchaser is accredited under the Regulation D standards for net worth and/or income, under appropriate circumstances.[5] In addition, we appreciate the Commission's recognition that another verification approach may include reliance on a database of accredited investors maintained by a third party.[6]

We strongly support the Commission's statement that an issuer would not lose the ability to rely on the Rule 506(c) exemption if the purchaser turned out to not be accredited so long as the issuer: (i) took reasonable steps to verify the purchaser was an accredited investor, and (ii) had a reasonable belief that the purchaser was an accredited investor.[7] In addition, we agree with the Commission's statement that if an issuer has "actual knowledge" that the purchaser is an accredited investor, the issuer would not have to take any steps at all.[8] We recommend, however, the Commission consider providing non-exclusive examples of circumstances in which an issuer would have "actual knowledge."

Finally, we strongly support the availability of Rule 506(c) for private funds.[9] The Commission has appropriately confirmed that privately offered funds may conduct general solicitation or general advertising under amended Rule 506(c) without the funds losing either of the Section 3(c)(1) or 3(c)(7) exclusions under the Investment Company Act.[10]

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[4] Proposal at 25.

[5] We note that, as under Rule 144A, issuers would not be able to rely on an investor certification as to an investor's accredited status that the issuer knew, or was reckless in not knowing, to be false. *See, e.g., Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities under Rules 144 and 145,* SEC Rel. 33-6862 (April 23, 1990).

[6] Proposal at 19, 25.

[7] Proposal at 29.

[8] Proposal at 17, n. 51.

[9] Proposal at 32 ("we believe the effect of Section 201(b) is to permit privately offered funds to make a general solicitation under amended Rule 506 without losing either of the exclusions under the Investment Company Act").

[10] We note that issuers such as private funds that rely on Rule 506 or 144A exemptions under the 1933 Act to offer and sell securities may also rely on certain registration exemptions or other relief under Commodity Exchange Act rules to offer and sell the interests as commodity pools, such as CFTC rules 4.7(b) (for "qualified eligible persons" as defined) and 4.13(a)(3) (for a *de minimis* amount of commodity interests and exempt from

Grandfathering Existing Non-Accredited Investors' Current and Future Investments

We request the Commission confirm that a Section 3(c)(1) fund that takes advantage of the general solicitation and advertising provisions in new Rule 506(c) be permitted to maintain non-accredited investors in the fund after the compliance date of the new rule.[11] In other words, any non-accredited investors that became investors in the fund before the effective date of Rule 506(c) would be grandfathered into the fund and permitted to maintain their investment as of that compliance date rather than be forced to redeem their interests. Issuers have already completed their due diligence on existing investors under current Rule 506(b)(2)(ii) to determine that they are sophisticated investors capable of evaluating the merits and risks of the investment. Thus, maintaining current investments made under current Rule 506 will not result in any harm to such investors.

For the same reasons, we request that the Commission permit current non-accredited investors who were previously offered and sold interests under current Rule 506(b) to continue any future planned investments in the issuer. Without a grandfathering provision, issuers and investors relying on a future planned investment, for example, may be unable to achieve the financing and investment goals they planned prior to the new Commission rules. Issuers should, however, be able to comply with Rule 506(b) with respect to those grandfathered non-accredited investors.

Proposed Amendment to Form D

The Commission is proposing to amend Form D required for each issuer claiming a Regulation D exemption to add a separate "check the box" requirement for issuers to indicate whether they are using general solicitation or general advertising in a Rule 506(c) offering. The Commission intends to use this to monitor the use of general solicitation and the size of the market. We support this proposed amendment. However, we request that the Commission confirm that issuers may check both boxes for Rule 506(b) and Rule 506(c), in the event that an issuer intends to rely on Rule 506(b), but inadvertent publicity occurs with respect to the offering.[12] The issuer must, of course, conduct reasonable steps to verify

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commodity pool operator requirements). Unlike the amended rules in the Proposal, CFTC rules 4.7(b) and 4.13(a)(3) do not permit the pools to be marketed to the public and the pools must be offered or sold pursuant to Section 4 of the 1933 Act and the regulations thereunder or Regulation S. We understand that the CFTC staff is aware that issuers face conflicting regulations in this regard. To avoid inconsistent treatment under the two regimes, we encourage the Commission to coordinate to the extent possible with the CFTC to harmonize the JOBS Act provisions with the applicable CFTC rules.

[11] For example, some non-accredited investors in a particular 3(c)(1) fund may be "knowledgeable employees" as defined in Rule 3c-5 of the Investment Company Act.

[12] We also request confirmation from the Commission that issuers may rely on any appropriate 1933 Act exemption, regardless of which box is checked on Form D and that any response on Form D will not preclude an issuer from relying an exemption for which the offer and sale qualifies. Further, we seek confirmation that Rule 508 of Regulation D, which provides that the exemption in Rule 506 will not be lost due to an "insignificant"

accredited investor status if it plans to rely on Rule 506(c) as an alternative to Rule 506(b) if any inadvertent publicity that constituted general solicitation or general advertising were present.

Preservation of Rule 506(b) Offerings without the Use of General Solicitation

We support the preservation under existing safe harbor Rule 506(b) for issuers to conduct Rule 506 offerings without the use of general solicitation. We also support the Commission's acknowledgment that the Proposal will not change the ability of issuers to still offer and sell privately placed securities to up to 35 non-accredited investors under Rule 506(b)'s sophistication requirements. We agree with the Commission that proposed Rule 506(c) should not impose any new requirements on offers and sales of securities that do not involve general solicitation. We recommend, however, that the Commission acknowledge in the final adopting release that issuers may rely on Rule 506(c) if they take reasonable steps to verify that all purchasers are accredited investors, even if the offering does not ultimately use general solicitation. Issuers that do not intend to conduct a general solicitation should have the option of relying on Rule 506(c) in lieu of Rule 506(b).[13]

Proposed Amendments to Rule 144A

As directed by the JOBS Act, the Commission proposes to amend Rule 144A(d)(1) to provide that securities may be offered pursuant to Rule 144A to persons other than QIBs by means of general solicitation or general advertising, provided that the securities are sold or resold only to persons that the seller and any person acting on behalf of the seller reasonably believe are QIBs.[14] The SEC noted that although Rule 144A does not include an express prohibition against general solicitation, offers of securities under Rule 144A currently must be limited to QIBs, which has the same practical effect. We support the Commission's proposed amendment to Rule 144A to permit general solicitation and advertising as long as purchasers are QIBs.[15]

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deviation from a term, condition, or requirement of Regulation D, applies to all offerings relying on Rule 506, including proposed Rule 506(c).

[13] Some firms may, for example, find Rule 506(c) procedures more compatible with their compliance programs than Rule 506(b) procedures.

[14] A "Rule 144A offering" is a primary offering of securities by an issuer to one or more financial intermediaries ("initial purchasers") in a transaction that is exempt from registration pursuant to Section 4(a)(2) or Regulation S, followed by the immediate resale of those securities by the initial purchasers to QIBs in reliance on Rule 144A. QIBs are a defined category of institutional investors that own and invest on a discretionary basis at least $100 million in securities.

[15] We recognize that the Commission proposed only those rules that are necessary to implement the JOBS Act. We recommend, however, that the Commission undertake to review and modernize the definition of QIB in a future rulemaking.

Further Clarification Regarding Regulation S

The Commission confirms in the Proposal that concurrent offshore offerings that are conducted under Regulation S under the 1933 Act[16] (where the U.S. portion of the offering is conducted under Rule 144A or Rule 506) would not be integrated with domestic unregistered offerings that are conducted in compliance with new Rule 506(c) or amended Rule 144A. Regulation S may be relied upon for offers and sales outside the United States even if coincident offers and sales are made in accordance with Regulation D inside the United States. We support the Commission's view and recommend that the Commission acknowledge in the final rule release that general solicitation or general advertising under a Rule 506(c) offering would not be considered "directed selling efforts" under a concurrent Regulation S offering.

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We appreciate the Commission's consideration of our comments on its proposed rule amendments to implement provisions of the JOBS Act to permit general solicitation or general advertising in Rule 506 and Rule 144A offerings. Please do not hesitate to contact the undersigned if the Commission or its staff has any questions or if we may provide any additional information regarding these matters.

Sincerely,

*/s/Monique S. Botkin*

Monique S. Botkin
IAA Assistant General Counsel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner

Ms. Meredith Cross, Director, Division of Corporation Finance
Mr. Norm Champ, Director, Division of Investment Management

[16] Securities offered and sold outside the United States in accordance with Regulation S need not be registered under the 1933 Act. Regulation S includes an issuer and a resale safe harbor if: (i) the securities are sold in an offshore transaction, and (ii) there are no directed selling efforts in the United States.